KATE BROWN
Governor

April 11, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

The Honorable R.D. James
Assistant Secretary of the Army – Civil Works
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

Re: Docket ID No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler and Assistant Secretary James,

The State of Oregon is providing these comments in response to the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers' February 14, 2019 request for comments on the proposed federal Waters of the United States (WOTUS) rule. We appreciate the opportunity to provide the State of Oregon's perspectives on the proposed new rule and its implications for our collective efforts to protect the integrity of the nation's waters.

Oregon's diverse ecosystems span the hydrologic spectrum, from the lush, wet rainforests near the coast to the arid, desert landscapes in eastern Oregon. This hydrology has also been altered in many areas of the state by urbanization, channelization, and re-routing of natural waterways through diversions and ditches. Multiple state agencies in Oregon have collective responsibility to carry out important federal and state environmental laws to ensure Oregon's treasured natural environment is protected and restored where needed.

The Clean Water Act programs and those programs that have been built around and upon those foundational Clean Water Act programs are vitally important to the nation's ecological and economic wellbeing. By extension, the Corps' and EPA's proposed revised definition of "Waters of the U.S." and the implications for these foundations programs are profound. The State of Oregon supported the 2015 WOTUS rule because it was based on sound science and took into account the practical and ecological realities of hydrology, seasonality and interconnected waters and continued to support Oregon's long and successful history of strong protections for water quality. As described by the EPA and the Corps in the material supporting the proposed rule,

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implementation of this rule will result in significant changes in how the nation protects water quality with consequences ranging from the loss of important protections to uneven protections across states. As a consequence, the proposed rule fails to achieve the objective of protecting the chemical, physical and biological integrity of Oregon's and our nation's waters.

This letter addresses Oregon's primary concerns:

1) The spatial scope of federal CWA programs administered by states and overseen by EPA will be reduced. The proposed rule will result in an impractical and inefficient patchwork of state and federal authorities to address protections formerly covered by state and federal implementation of the Clean Water Act.
2) Under the proposed rule, Oregon will have less opportunity to ensure that state interests are considered during the issuance of federal permits in the coastal zone under the Coastal Zone Management Act of 1972 and under state water quality certifications pursuant to CWA Section 401.
3) The rule will create practical implementation challenges stemming from a lack of clarity in the proposed definitions and an inadequate availability of mapping data.
4) The Economic Analysis prepared by EPA and the Corps' did not adequately take into consideration and/or characterize the states' administrative burden to maintain the scope of water quality programs, nor inequalities between states, nor economic impacts associated with environmental outcomes.
5) The proposed scope of the Waters of the United States is overly narrow and does not reflect the science supporting the ecological importance of the excluded waters to overall watershed health and function.
6) EPA and the Corps do not adequately address implementation of state water quality programs based on "waters of the state" on federal lands.

1) The spatial scope of CWA programs administered by states and overseen by EPA will be reduced. The proposed rule will thus result in an impractical and inefficient patchwork of state and federal authorities to address protections formerly covered by state and federal implementation of the Clean Water Act.

Core water quality programs administered by states include adoption of water quality standards, assessments of those water quality standards under CWA sections 303(d) and 305(b), development of Total Maximum Daily Loads and implementation of nonpoint source programs, and development and issuance of individual and general NPDES permits. Oregon has been like many other states in its approach to implementing these programs in that these programs generally apply to surface waters in the state. Similarly, EPA has consistently acted on these state actions without a concurrent jurisdictional analysis.

EPA and the Corps clearly state that these federal Clean Water Act programs administered by states will be limited to comport with the proposed WOTUS definition and asserts that states would fill in any gaps or already have expanded program where needed or desired. They also reference expansive Waters of the State definitions in many state statutes and state authorities that may expand beyond the authorities conferred to states by the Clean Water Act. As proposed, this represents a significant shift in how state and federal authorities and responsibilities would function and raises key questions and considerations that must be evaluated:

- For states that seek to maintain the current scope of their water quality programs, significant resources and time would be required to adjust state statutes and regulations for each water quality program in order to specify how state water quality programs - which would now be split between state and federal authorities - would dovetail with the reduced scope of the federal Clean Water Act programs and maintain coverage. This would require revisions to multiple regulations and statutes. For example, the Oregon Department of Environmental Quality would need to review its universe of individual and general permittees to determine whether Oregon's state permitting program would need to be revised and expanded to ensure that the permits to dischargers to surface waters no longer considered WOTUS still contain requirements that are protective of surface water quality. This would include evaluation of Oregon's 2,000+ current entities that have permit coverage under stormwater general and individual permits that discharge to myriad of different types of natural, constructed, and altered waterways.

- EPA's oversight role would be significantly more resource-intensive and complicated. As acknowledged by the federal agencies, reliable data and information delineating waters that would be considered jurisdictional, does not currently exist. For states that seek to continue to operate programs that continue to extend beyond the definition presented in the proposed rule, it will necessitate EPA's development of information and procedures in order for its oversight actions to be executed consistent with its authority.

2) Under the proposed rule, Oregon will have less opportunity to ensure that state interests are considered during the issuance of federal permits in the coastal zone under the Coastal Zone Management Act of 1972 and under state water quality certifications pursuant to CWA Section 401/404.

Oregon's Department of Land Conservation and Development administers the federal coastal zone consistency authority for the state. Under that authority, if the proposed activity is not consistent with Oregon's coastal program, the federal permit may not be issued. This authority would be reduced along with other major federal laws that are triggered by federal permit applications that, when taken together, protect the resources of the coastal zone that our coastal communities depend upon.

Oregon's Clean Water Act section 401 program reviews projects that require a federal license or permit that may have a discharge to a navigable waterway to ensure the project or activity will be protective of state water quality standards. Under the proposal to exclude all ephemeral streams and wetlands that do not have a direct surface connection to jurisdictional waters, Oregon will no longer have the opportunity to review and condition permits under its 401 program for projects and activities to these waters, and important environmental protections will be lost.

The Corps and the Oregon Department of State Lands (DSL) currently use a joint application for permitting activities in wetlands. Although each agency independently reviews the applications and issues its own permit, they routinely share information to resolve issues encountered during the process and resolve violations for non-compliance with permit conditions or for unauthorized activities. The EPA is responsible for administering the CWA through the Corps and handles enforcement for unauthorized activities subject to the CWA. Joint enforcement and compliance actions by the agencies ensure an expedited process. The loss of Corps and EPA jurisdiction for some wetland types would result in the absence of federal information sharing and review. To address this loss of information and authorities, the state would need to develop additional authorities and resources for DSL or another agency to protect and enforce compliance for these wetlands.

In addition, under the proposed rule, to maintain the same level of review and evaluation for all projects that affect waterways, and to ensure that the water quality of state waters is not reduced, Oregon would need to amend its current statutory and/or regulatory authorities to issue the equivalent type of water quality certifications to accompany state permits currently issued by DSL or through state assumption of the section 404 program. This effort will require considerable resources and time to revise statutory and/or regulatory authorities, evaluate and implement changes to budget and funding for these changes, and establishing new administrative processes.

3) The rule will create practical implementation challenges stemming from a lack of clarity in the proposed definitions and an inadequate availability of mapping data.

While the proposed rule purports to increase CWA program predictability and consistency by increasing WOTUS clarity, in many cases it does the opposite. Several terms are not clearly defined and require additional specificity and definition:

- "Typical year" is defined in the rule as "the normal range precipitation over a rolling 30-year period for a particular geographic area, excluding times of drought or extreme flooding." Notably, the agencies propose to consider a year to be "typical" when "observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year rainfall average." The agencies also propose to use a

"watershed-scale basis" as the geographic area for typical year. Finally, the definition for intermittent waters also introduced another modifier, describing intermittent waters as surface waters flowing continuously during "certain times of a typical year".

Taken together, "typical year" and the related terms and modifiers have not added clarity to the proposed rule, instead introduce considerable uncertainty. In any final rule, the agencies should ensure that the definition itself (as well as other definitions incorporating it and modifying it by limiting "typical year" further with vague modifiers such as "certain times of typical year") does not end up becoming confusing or cumbersome and consider the varying availability of precipitation and other data needed to inform the definition.

- "Ditches" are defined as "artificial channels used to convey water", and would be jurisdictional under the proposed rule if they are constructed in a tributary, which is defined as a naturally occurring surface water channel. While the attempt to clarify the definition of a jurisdictional ditch is appreciated, the definition remains unclear with regard to its relationship to tributaries. It is clear what a ditch "constructed in a tributary" means in many instances. For example: if a tributary is rerouted into a ditch excavated in upland, is the tributary no longer "naturally occurring"? Would the ditch itself be considered "constructed in a tributary" and if not, does that introduce a temporal element into the definition as well? We encourage the agencies' to further clarify the treatment of ditches.

- "Intermittent" is defined as "surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated, for example, or when snowpack melts." It is unclear what "certain times" of a typical year means and how far the surface water has to flow to be "continuous." The proposed rule is also unclear with regard to when waters will be considered ephemeral. In EPA and the Corps' co-regulator meetings, EPA suggested that some types of waters where flow is on the surface, then has subsurface flow only to resurface may be considered intermittent and not ephemeral. This highlights the difficulty of distinguishing between intermittent and ephemeral.

In addition, identification of different types of waters may differ depending on the data source. While the National Hydrography Dataset (NHD) contains many of these labels for various waters, it should not form the basis of delineating between intermittent and ephemeral due to the unreliability of the data forming the basis of whether streams are labeled as intermittent/ephemeral.

The proposal also does not adequately address how EPA and the Corps intend to address the dynamic nature of waterbodies—both historic alterations and those that will occur into the future. Many waters have undergone channel alteration or flow modification over time. Examples include straightened and incised streams; flow diversions or impoundments that result in flow being re-routed and reintroduced downstream or transferred into other waterbodies. Some of these examples result in a loss of surface connection from what would otherwise be adjacent wetland or transforming a waterbody that would otherwise be perennial or intermittent becoming ephemeral. In addition, EPA and the Corps have stated that if a barrier were constructed between a jurisdictional water and what would otherwise be an adjacent wetland, the wetland would no longer be jurisdictional. From a practical standpoint, these waters retain their connectivity to adjacent and downstream waters and should remain jurisdictional.

4) The Economic Analysis prepared by EPA and the Corps' did not adequately take into consideration and/or characterize the states' administrative burden to maintain its current scope of WOTUS related programs, nor inequalities between states, nor economic impacts associated with environmental outcomes.

The proposed rule would require action on the part of states to establish or revise their regulations and statutes to maintain existing regulatory program coverage and protection. For Oregon, this will require a significant amount of effort and time to analyze and revise relevant requirements and authorities to maintain current program scope as well as, in the case of a narrowed 404 program, an urgency to pursue assumption of the 404 program and develop the program as needed to maintain current wetland protections. These efforts could include one of more of the following activities depending on the level of administrative and program revisions needed: administrative rulemaking, evaluating and addressing resource needs, amending statutes, and assessing and amending funding mechanisms.

The agencies' Economic Analysis did not acknowledge or evaluate this work. Rather, the analysis does not attribute any costs to states for water quality standards program revisions and only attributes costs associated with state TMDL programs to instances where TMDLs are revised. These conclusions entirely miss the costs associated with identifying the watershed-by-watershed spatial scope needed to define where the state law-based equivalent programs would apply, developing the administrative process and record for such programs, review of this analysis by EPA to gain concurrence on the scope of federal programmatic oversight, or identifying and implementing processes to ensure these programs continue to operate within the state in a seamless manner.

Given these factors, the agencies should include a multi-year delayed effective date to give states the time to evaluate and thoughtfully develop any programs that are needed.

5) The proposed scope of the Waters of the United States is overly narrow and does not reflect the science supporting the ecological importance of the excluded waters to overall watershed health and function.

Ecologically meaningful hydrologic connectivity is not severed by a discontinuous surface connection nor is temporary or subsurface connection negligible in terms of its importance to downstream waters and their beneficial uses. While Oregon is not advocating for the inclusion of sub-surface waters as jurisdictional under WOTUS, a variety of surface waters identified below play a critical role for protecting downstream perennial waters and their ecological value.

Wetlands

Wetlands function as keystone habitats for Oregon's fish and wildlife and provide important water quality benefits for the State of Oregon. The proposed rule will decrease the extent of federal protections for wetlands and the ecosystem services provided by these waters.

Wetlands, as well as bogs, vernal pools, wet meadows, and other high quality ecosystems that species rely upon serve many of the same functions as the wetlands proposed to be included in the definition of WOTUS, even if they have no direct surface connection. Additionally, hyporheic flow often occurs between these types of wetlands and nearby streams; impacts to wetlands irrespective of surface connection to adjacent waters may affect the water quality of the connected flowing waterbody.

These waterbodies provide essential life-history functions for wildlife, including waterfowl. Migrating waterfowl, such as Dusky Canada Geese, depend on seasonal wetlands in the fall, and isolated wetlands that support high-quality forage is essential for summer brood-rearing. High-quality forage in sufficient spatial and temporal distribution in these wet habitats are necessary to sustain migratory and wintering populations of many species, and these conditions influence migration patterns and habitat use. For example, overwinter survival and breeding success are correlated with access to high-quality forage (e.g., forbes, invertebrates). If these wetlands, and the high-quality forage they produce were unavailable or scarce during migration, waterfowl may reach wintering or breeding grounds in poor condition which may affect reproductive success.[12]

[1] Boggie MA, Collins DP, Donnelly JP, Carleton SA (2018) Land Use, anthropogenic disturbance, and riverine features drive patterns of habitat selection by a wintering waterbird in a semi-arid environment. PLoS ONE 13(11): e0206222. https://doi.org/10.1371/journal.pone.0206222

[2] https://iwjv.org/sites/default/files/donnelly_sonec_wetdynamic_techreport.pdf

In Oregon, the remaining wetlands in the Klamath Basin support one of the largest concentrations of waterfowl in North America, with over three million ducks and a half-million geese migrating through the basin annually. The area is a critical migratory staging area for 80 percent of all Pacific Flyway waterfowl. In the winter, the Klamath Basin hosts the largest wintering population of Bald Eagles in the continental United States. The Klamath Basin also provides Oregon's only permanent nesting areas for Red-necked Grebes and Yellow Rails[3]. Though many of these habitat features are not permanent, they have an ecological value disproportionate to their abundance on the landscape.[4]

Floodplain wetlands are another example where there may be ecologically meaningful hydrologic connectivity without evidence of a surface connection. Whether continuous or discontinuous, surface or subsurface, lateral connectivity between mainstem streams and floodplain wetlands has implications for fish and wildlife and for the ecohydrology of perennial mainstem streams. Permanent and seasonal floodplain wetlands serve as important water reservoirs, withholding waters from mainstem flow during periods of high flow and gradually returning waters during periods of lower flow. By maintaining baseflows during hotter, dryer portions of the year, these wetlands can moderate warm water temperatures and poor water quality, both of which play a role in determining the type and degree of support for beneficial uses in perennial mainstem rivers.

Rare vernal pool wetlands in the Agate Desert near Medford, Oregon support several rare plant and animal species, such as vernal pool fairy shrimp which is listed as Threatened under the federal Endangered Species Act[5]. Vernal pool fairy shrimp require vernal pools or ephemeral pools, preferably with cold water, to complete their life cycle. Prior to seasonal drying of the pools, females produce eggs, which can dry out and lie dormant until pool re-filling occurs, at which time the eggs will hatch. These and other vernal pool types of wetlands are formed in areas with unusual topography and soil layering, and are very difficult to replace when ground is leveled for development. In semiarid regions of eastern Oregon, the distribution of many terrestrial species is related to the presence of water. For example, the distribution of Greater Sage-Grouse, listed as Sensitive in Oregon and federally as a Species of Conservation Concern, is correlated to the proximity to wet habitats, such as seasonal wet meadows, playas, and streamside habitats. These seasonal wet meadows and playas, especially with native forbs, are essential during brood rearing[6].

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[3] http://www.oregonconservationstrategy.org/strategy-habitat/wetlands/

[4] Donnelly, J.P., D.E. Naugle, C.A. Hagen and J.D. Maestas. 2016. Public lands and private waters: scarce mesic resources structure land tenure and sage-grouse distributions. *Ecosphere*, 7(1): e01208. (*https://doi.org/10.1002/ecs2.1208*)

[5] https://www.fws.gov/oregonfwo/articles.cfm?id=149489448

[6] https://www.dfw.state.or.us/wildlife/sagegrouse/docs/20110422_GRSG_April_Final%2052511.pdf

The proposed Waters of the United States definition that would only include wetlands that have a surface connection to waters that are jurisdictional is an arbitrary distinction not supported by science. A surface break in flow is a distinction without difference with regard to the importance of wetlands to adjacent waters, and should be included.

Lakes and Closed Basins

Under the proposed rule, many lakes in Oregon, including world-renowned Crater Lake and most natural lakes in southeastern Oregon, would no longer have WOTUS status protection. Excluding extensive networks of waters contained in closed basins solely because they do not contribute perennial or intermittent flow to traditional navigable water will exclude significant portions of streams in the arid west vital to supporting unique ecosystem services. These areas are characterized by unique ecological properties that deserve adequate protection under the CWA.

In fact, one of the largest hydrologic unit basins in Oregon (by area) is the Oregon Closed Lakes Basin. All lakes and waterways in this basin will lose federal protection, and many other lake in other basins will also no longer be considered WOTUS jurisdictional under the proposed rule.

Ephemeral Streams

Oregon supports EPA and the Corps' inclusion of intermittent streams, however, excluding ephemeral streams from the definition of the Waters of the U.S. is a distinction without a difference. These waters are essential to protecting the overall health of a watershed including the protection of drinking water, recreation, fish, wildlife and their habitats, as well as economies dependent on those systems.

Stream networks with significant ephemeral and intermittent extents are commonplace in eastern Oregon and throughout the arid West. In fact, the United States Geological Survey's National Hydrography Dataset (NHDPlusV2) categorizes over half of the waterways in Oregon as intermittent or ephemeral.[7] Oregon is encouraged to see intermittent streams included in the proposed definition of Waters of the United States; this aspect of the definition must remain in any final rule.

[7] Even this estimate may be biased low. Many existing mapping products do not provide a consistent and unbiased means for delineating permanent and seasonal waters. For example, delineation of the perennial extent based on NHD may be relatively unbiased in western Oregon while tending to overestimate the perennial extent in more semiarid/arid regions like those common in eastern Oregon. *See* Fritz, K.M., E. Hagenbuch, E. D'Amico, M. Reif, P.J. Wigington, Jr., S. G. Leibowitz, R.L. Comeleo, J.L. Ebersole, and T. Nadeau. 2013. Comparing the extent and permanence of headwater streams from two field surveys to values from hydrographic databases and maps. *Journal of the American Water Resources Association*, 49(4): 867-882. (*https://doi.org/10.1111/jawr.12040*)

Headwater streams are often ephemeral. These are important for the overall function of a watershed for sediment, nutrient, and flood control, and they help maintain biological diversity, and are essential for the water quality in downstream perennial streams, which are essential for Oregon's fish and wildlife, including ecologically and economically valuable cold-water species like salmon, steelhead, and trout, as well as other native fish and wildlife. The ability of those perennial waters to function as habitat for those species throughout the year is tied to this larger stream network. For example, during summer months when stream flows are low and water temperatures are elevated, some fish species rely on localized pockets of cooler water for survival delivered by these upstream networks. Many of these "cold water refugia" exist because subsurface hydrologic connections persist even after the seasonal loss of surface connectivity.[8] While Oregon is not suggesting that subsurface water be included in the definition of the Water of the United States, ephemeral waters feed surface and subsurface flows and contribute critical cold water flows to downstream waters.

The conclusions above are supported by a 2019 American Fisheries Society Special Report[9], which documents the critical roles headwater streams and wetlands, including those that are intermittent or ephemeral, play in sustaining the nation's ecosystems, imperiled species, recreational and commercial fisheries, and cultures. This report is replete with Oregon examples including the role of headwaters in the recovery and delisting of Oregon Chub and Modoc Sucker, which in 2014 and 2015, respectively, became the first and second fish species ever to be delisted from the federal Endangered Species Act due to recovery. When considered cumulatively across the drainage network, intermittent and ephemeral waters are vital for determining the quality of perennial water and, hence, the beneficial uses supported in downstream perennial reaches and the health of economies tied to these resources.

In Oregon, salmon and steelhead are a vital part of our natural heritage, culture, and economy. These iconic fish support commercial and recreational fisheries that contribute millions of dollars to the nation's economy each year. The economic contributions of these fisheries are particularly important in many rural and coastal communities in Oregon. For example:

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[8] Ebersole, J.L., P.J. Wigington, Jr., S. G. Leibowitz, R.L. Comeleo and J. Van Sickle. 2015. Predicting the occurrence of cold-water patches at intermittent and ephemeral tributary confluences with warm rivers. *Freshwater Science*, 34(1): 111-124. (*https://doi.org/10.1086/678127*)

[9] Collville, S.A., M.P. Sullivan, P.D. Shirey, R.W. Colvin, K. O'Winemiller, R.M. Hughes, K.D. Fausch, D.M. Infante, J.D. Olden, K,R, Bestgen, R.J. Danehy and L. Eby. 2019. AFS Special Report: Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services. *Fisheries*, 44(2): 73-91. (*https://doi.org/10.1002/fsh.10229*)

- Oregon's recreational salmon and steelhead fisheries provided an economic impact of $53.8 million in 2013 and $57.1 million in 2014.[10]
- Between 2012 and 2017, commercial ocean troll and recreational ocean fisheries for salmon in Oregon provided an average annual personal income impact of over $19 million with much of that impact delivered to coastal communities.[11]
- Even beyond salmon and steelhead, recreational fishing is an economic driver across Oregon. In 2011, the year of the most recent National Survey of Fishing, Hunting and Wildlife-Associated Recreation, 638,000 recreational anglers spent over 5.6 million days of fishing in Oregon with total fishing-related expenditures exceeding $640 million.[12]

In addition, ephemeral waters in drier climates, such as in Eastern Oregon, vary spatially and temporally. For example, the Oregon Department of Fish and Wildlife (ODFW) conducted annual status surveys for redband trout in an eastern Oregon basin (Rock Creek) from 2007 to 2012. The interannual variability in the number of sites visited that were dry was substantial (2007 – 56% dry; 2009 – 18% dry; 2010 & 2011 – 0% dry; 2012 – 75% dry). Despite this variability and the large extent of drying in some years, ODFW concluded "redband trout in this system appear to be abundant relative to other areas in the northern portion of the Great Basin."[13] Aquatic habitat that is periodically and unpredictably dry does not necessarily cease to be important habitat for Oregon's fish and wildlife.

The current proposal does not provide a framework that adequately protects aquatic resources. Many of Oregon's important ecosystems that provide critical habitat - including ephemeral streams, wetlands that don't connect to larger waters, terminal lakes and ponds, et al. - will lose federal protection putting drinking water, recreation, fish, wildlife and their habitats, as well as economies dependent on those systems at risk. The absence of an adequate and consistent federal regulatory floor for Clean Water protections will leave states to fill the gap, setting up the potential for migratory species like salmon, steelhead, and waterfowl to be subject to a patchwork of varying protections across the interstate extent of their ranges. Relying on states to fill the gap, without adequately assessing the administrative challenges and economic impacts on state programs is neither sufficient nor sustainable approach to protecting the nation's waters.

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[10] The Research Group, LLC. 2015. Oregon Marine Recreational Fisheries Economic Contributions in 2013 and 2014. Report Prepared for the Oregon Department of Fish and Wildlife and Oregon Coastal Zone Management Association. September 2015.
[11] See Table IV-17 *in* Pacific Fishery Management Council. 2019. Review of 2018 Ocean Salmon Fisheries: Stock Assessment and Fishery Evaluation Document for the Pacific Coast Salmon Fishery Management Plan. (Document prepared for the Council and its advisory entities.) Pacific Fishery Management Council, Portland, OR.
[12] US. Department of the Interior, U.S. Fish and Wildlife Service, and U.S. Department of Commerce, U.S. Census Bureau. 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.
[13] Meeuwig, M.H. and S.P. Clements. 2015. Temporal variability in the distribution and abundance of a desert trout: Implications for monitoring design and population persistence in dynamic stream environments. Technical Report, Oregon Department of Fish and Wildlife, Corvallis, Oregon.

EPA and the Corps should explicitly evaluate the work that will be necessary for states to fill these gaps. While the State of Oregon does support keeping intermittent streams jurisdictional, it does not support excluding ephemeral, and NHD should not form the basis of delineating between intermittent and ephemeral due to the unreliability of the data forming the basis of whether streams are labeled as intermittent/ephemeral.

6) EPA and the Corps do not adequately address implementation of state water quality programs based on "waters of the state" on federal lands.

EPA and the Corps presume in their analysis of states' potential reactions to the proposed Waters of the U.S. definition and the associated narrowing of Clean Water Act programs that states that choose to continue to administer more expansive water quality programs will do so based on the state's definition of "Waters of the State." In Oregon, while this is a likely outcome, in addition to the level of resource necessary to implement programs based on state authorities (as described above in this letter), another significant consideration is the implementation of these authorities on federal lands.

As described in the preceding section, headwaters, ephemeral waters, and wetlands all serve essential functions in the overall watershed health and ecology. In Oregon, over 50% of land within the state is owned by the federal government managed by various government agencies. Most federal land is in the Cascade mountain range and Eastern Oregon, which has significant overlap with waters proposed to be excluded from federal jurisdiction and water quality protections would need to rely on state administered programs.

EPA and the Corps fail to address how programs administered by states to fill gaps associated with a narrowed Waters of the U.S. definition would be implemented by federal agencies on federal lands. Example include implementation of Load Allocations within Total Maximum Daily Loads or addressing wetland protections or mitigation arising from a state wetlands protection program.

Please note that it has been difficult to provide quantitative information and in-depth analysis on some of these issues because the comment extension request was not granted.

Based on these concerns, Oregon strongly recommends the final rule include the following:

- An expanded definition of jurisdictional wetlands to include adjacent wetlands; and
- Retain the inclusion of intermittent streams and expand the definition to include ephemeral streams, as well as lakes and streams in closed basins.

In order to produce an implementable rule, EPA and the Corps should:

- Continue dialog with states after the close of the comment period to plan implementation, further assess states' plans with regard to implementation, including resources needed by both the state and federal government and planning how to address potential regulatory gaps;
- Provide adequate time for states to evaluate and adapt current programs as desired to address any gaps in environmental protections, particularly if the final rule is diminished in scope from the current regulatory requirements; and
- Affirmatively address the ability of states' water quality programs to address water quality protections on federal lands.

Thank you for your consideration of our state's concerns and recommendations in this matter. Please address any written correspondence concerning our recommendations to the Oregon Department of Environmental Quality, Attention: Jennifer Wigal, Deputy Administrator, Water Quality Programs, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232-4100.

Sincerely,

Kate Brown

Governor Kate Brown

Distribution:
Oregon Department of Environmental Quality
Oregon Department of Fish and Wildlife
Oregon Department of Forestry
Oregon Department of State Lands
Oregon Department of Land Conservation and Development
Oregon Department of Agriculture
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